

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

KEVIN M. KEAY,

10-CV-1100-BR

Plaintiff,

OPINION AND ORDER

v.

**VETERANS AFFAIRS REGIONAL
OFFICE and VETERANS AFFAIRS
MEDICAL CENTER,**

Defendants.

KEVIN M. KEAY
555 West Eighth Street
Apt. #425
Vancouver, WA 98660

Plaintiff, *Pro Se*

DWIGHT C. HOLTON
United States Attorney
RONALD K SILVER
Assistant United States Attorney
1000 S.W. Third Ave., Suite 600
Portland, OR 97204
(503) 727-1000

Attorneys for Defendants

BROWN, Judge.

This matter comes before the Court on Defendants' Motion (#16) to Dismiss Pursuant to Fed. R. Civ. P. 12(b). For the reasons that follow, the Court **GRANTS** Defendants' Motion.

BACKGROUND

On October 31, 2006, Plaintiff Kevin M. Keay filed an administrative Claim for Damage, Injury or Death with Defendant Veterans Affairs Medical Center (VAMC) in which he alleged:

During a routine CT scan w/ contrast was contaminated with the HIV virus and injected it into me causing a staph infection from the knee injection site to the hip. You MURDERED ME, AND THERE IS A WITNESS.

Decl. of Rex Cray, Ex. 1 at 1. On his Claim form Plaintiff listed his address as 8350 S.W. Monticello Court, Beaverton, Oregon 97008.

On November 13, 2006, Plaintiff filed another administrative Claim for Damage, Injury or Death with the VAMC in which he alleged:

Dr. Moreau put me on Tramadol, Ambien-CK, cyclobenzapine, and carbainazepine for AVN of the right femur pain. He then turned around and said he needed OHSU records on the MRI and records of the knees. He stated when he receive[d] it he would reissue the meds but failed to do as he said.

Cray Decl., Ex. 2 at 1. On his Claim form Plaintiff again listed

his address as 8350 S.W. Monticello Court, Beaverton, Oregon 97008.

On February 20, 2007, Plaintiff filed a third administrative Claim for Damage, Injury or Death with the VAMC in which he alleged:

Portland VAMC has been denying me surgery & pain pills on a service connected right knee and continues to deny all surgerys [sic] for 12 more monthes [sic] forcing me to suffer severe pain and mental stress.

Cray Decl., Ex. 3, at 1. Plaintiff also alleged "exposure to PD-680." *Id.* Plaintiff did not list any address on this Claim form.

On June 20, 2007, the Department of Veterans Affairs denied each of Plaintiff's claims and advised Plaintiff:

If you are dissatisfied with the decision to deny this administrative tort claim, you may file a request for reconsideration of your claim with the VA General Counsel. . . . To be timely filed, the VA must receive this request prior to the expiration of 6 months from the date of the mailing of this final denial. Upon filing such a request for reconsideration, VA shall have 6 months from the date of that filing in which to make final disposition of the claim, and your option to file suit in an appropriate U.S. District Court under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of such request for reconsideration (28 C.F.R. Section 14.9).

In the alternative, if you are dissatisfied with the action taken on this administrative tort claim, you may file suit in accordance with the Federal Tort Claims Act, section 1346(b) and 2671-2680, title 28, United States Code, which provides a tort claim that is administratively

denied may be presented to a Federal district court for judicial consideration. Such a suit must be initiated within 6 months after the date of the mailing of this final denial as shown by the date of this letter (section 2401(b), title 28, United States Code).

Cray Decl., Ex. 4 at 1, 3, 5. The Department of Veterans Affairs addressed its denials to the Beaverton address that Plaintiff listed on his Claim forms.

Plaintiff did not file a request for reconsideration as to any of his Claims.

On September 16, 2010, Plaintiff filed a Complaint in this Court alleging:

I served in the USAF 1980-1984. I was exposed to the mil-PD-680 chemical which the VAMC in Portland covered up my medical records and falsified [sic] xrays, MRIs, CT scans too. OHSU Dr's [sic] confirmed avascular necrosis = the dying off of bone marrow in legs, arms, back, pelvis. The fraud and coverup by Portland VAMC and VARO.

The benzine chemical has ravaged my bones brittle and very painful too.

I want \$450 Billion for surgery and equipment and care nurse 24/7. I feel a jury should hear this case.

On January 31, 2011, Defendants filed a Motion to Dismiss.

STANDARDS

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *[Bell Atlantic v. Twombly]*, 550 U.S. 554,] 570, 127 S. Ct. 1955. A claim has facial plausibility when the plaintiff

pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556 The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* at 557, 127 S. Ct. 1955 (brackets omitted).

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). See also *Bell Atlantic v. Twombly*, 550 U.S. 554, 555-56 (2007). The court must accept as true the allegations in the complaint and construe them in favor of the plaintiff. *Intri-Plex Tech., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1050 n.2 (9th Cir. 2007). "The court need not accept as true, however, allegations that contradict facts that may be judicially noticed by the court." *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000)(citations omitted). The court's reliance on judicially-noticed documents does not convert a motion to dismiss into a summary-judgment motion. *Intri-Plex*, 499 F.3d at 1052.

Even after *Iqbal* and *Twombly*, the Ninth Circuit has held complaints of individuals who are proceeding *pro se* must be held to less stringent standards than formal pleadings drafted by lawyers, as the Supreme Court has reaffirmed since *Twombly*. See *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam). *Iqbal* incorporated the *Twombly* pleading standard and *Twombly* did not alter courts' treatment of *pro se* filings; accordingly, we continue to construe *pro se* filings liberally when evaluating them

under *Iqbal*.

Hebbe v. Pliler, 627 F.3d 338, 341-42 (9th Cir. 2010).

Accordingly, before the court dismisses a *pro se* complaint for failure to state a claim, the court still must provide the plaintiff with a statement of the complaint's deficiencies and give the plaintiff leave to amend the complaint unless it is clear that the deficiencies of the complaint cannot be cured by amendment. *Rouse v. United States Dep't of State*, 548 F.3d 871, 881-82 (9th Cir. 2008).

DISCUSSION

Defendants move to dismiss Plaintiff's Complaint on the grounds that Plaintiff (1) failed to file his Complaint within the applicable statute of limitations after denial of his administrative claims and (2) failed to exhaust his administrative remedies as to any new claims he may be seeking to bring in this action.

I. Plaintiff failed to file this action within the applicable limitations period.

A. Exhaustion requirements

28 U.S.C. § 2675(a) provides in pertinent part:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government . . . unless the claimant shall have first presented the

claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

In addition, 28 U.S.C. § 2401(b) provides:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

B. Analysis

The record reflects Plaintiff filed three Claims with the Department of Veterans Affairs related to the VAMC. Plaintiff, however, failed to request reconsideration of any of those Claims and, therefore, failed to obtain a final decision from the Department of Veterans Affairs. Accordingly, to the extent that Plaintiff's Complaint relates to matters that he raised in his Claims with the Department of Veterans Affairs, the Court concludes Plaintiff failed to exhaust his administrative remedies with respect to those claims.

Even if the June 20, 2007, response to Plaintiff's claims by the Department of Veterans Affairs could be considered a final disposition, Plaintiff filed this action in September 2010, and, therefore, he failed to file this action within "six months after the date of mailing . . . of notice of final denial of the claim" by the Department of Veterans Affairs.

Accordingly, the Court concludes Plaintiff failed to file this action within the applicable limitations period.

In his Response to Defendants' Motion to Dismiss, Plaintiff appears to assert that the Department of Veterans Affairs sent its June 20, 2007, decisions to the incorrect address. The record reflects, however, that Plaintiff has lived at his Vancouver address only since 2008. Before that time he lived at the Beaverton address he listed on his Claims. As noted, the Department of Veterans Affairs sent its decisions to Plaintiff's Beaverton address as it appeared on Plaintiff's Claim forms. Accordingly, the Court concludes Plaintiff has not established that he did not receive notice of the decisions of the Department of Veterans Affairs or that he was unaware that he was required to either request reconsideration or to file an action with this Court within six months of the Department's decisions.

On this record the Court concludes to the extent that Plaintiff seeks to challenge the matters he raised in his administrative Claims, Plaintiff failed to exhaust his administrative remedies and failed to file an action with this Court within the limitations periods set out in 28 U.S.C. §§ 2675(a) and 2401(b).

II. Plaintiff has not exhausted his administrative remedies as to any new claims.

To the extent that Plaintiff brings this action to allege

claims other than those that formed the basis for his 2006 and 2007 administrative Claims with the Department of Veterans Affairs, the record does not reflect Plaintiff has filed any other administrative Claims with the Department of Veterans Affairs. Accordingly, the Court concludes to the extent that Plaintiff seeks to challenge matters other than those that formed the basis for his 2006 and 2007 administrative Claims, Plaintiff has not exhausted his administrative remedies.

Although Plaintiff is proceeding *pro se*, the Court concludes it is clear on this record that the deficiencies of Plaintiff's Complaint as to those issues that formed the basis for his 2006 and 2007 administrative Claims cannot be cured by amendment. Accordingly, the Court dismisses all claims arising from those issues with prejudice and without leave to file an amended complaint.

To the extent Plaintiff brings this action to allege claims other than those that formed the basis for his 2006 and 2007 administrative Claims with the Department of Veterans Affairs, the Court grants Plaintiff leave to amend his Complaint **no later than June 24, 2011**, if he can allege claims that are based on administrative Claims he fully exhausted with the Department of Veterans Affairs and challenges within the limitations periods set out in 28 U.S.C. §§ 2675(a) and 2401(b).

CONCLUSION

For these reasons, the Court **GRANTS** Defendants' Motion (#16) to Dismiss Pursuant to Fed. R. Civ. P. 12(b). To the extent that Plaintiff challenges the matters raised in his 2006 and 2007 administrative Claims with the Department of Veterans Affairs, the Court **DISMISSES** those claims **with prejudice**.

To the extent that Plaintiff challenges matters he did not raise in any administrative Claim before the Department of Veterans Affairs, the Court **DISMISSES** those claims **without prejudice**. The Court grants Plaintiff leave to amend his Complaint **no later than June 24, 2011**, if he can allege claims that are based on administrative Claims he fully exhausted with the Department of Veterans Affairs and challenges within the limitations periods set out in 28 U.S.C. §§ 2675(a) and 2401(b). The Court advises Plaintiff that failure to file an amended complaint by June 24, 2011, shall result in the dismissal of this

proceeding with prejudice.¹

IT IS SO ORDERED.

DATED this 2nd day of June, 2011.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

¹ A dismissal with prejudice would mean Plaintiff may not be able to bring his claims or related claims against Defendants in any future action.